

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TREVOR REINHOLT, an individual,

Plaintiff,

v.

SCHWAN'S HOME SERVICE, INC.,
a Minnesota corporation,

Defendant.

NO: 2:14-CV-7-RMP

ORDER GRANTING SUMMARY
JUDGMENT

Before the Court is Defendant's Motion for Summary Judgment. ECF No. 21. A hearing on this motion was held on November 5, 2014. Plaintiff was represented by Darryl Parker. Defendant was represented by Thomas McLane.

The Court has considered the motion, response, reply, all supporting documents, and the parties' oral arguments. The Court is fully informed.

BACKGROUND

Plaintiff Trevor Reinholt was injured in the scope of his employment with Defendant Schwan's Home Service, Inc., when he was using a propane heater to defrost a truck and gas from the heater ignited.

1 Schwan's sells frozen food through home delivery, the food service industry,
2 and grocery stores. ECF No. 26 at 3. Mr. Reinholt was employed by Schwan's as
3 a material handler in the company's Spokane, Washington, warehouse from March
4 2005 until November 2013. ECF No. 29 at 1, 2. His primary job duties included
5 transferring frozen food between Schwan's trucks and warehouse freezers. ECF
6 No. 29 at 1-2.

7 During the last two years of Mr. Reinholt's employment at Schwan's, his
8 supervisor was Corey Pape. ECF No. 29 at 2. Mr. Reinholt claims that Mr. Pape
9 "consistently verbally abused and threatened [him,]" made unreasonable work
10 demands on him, and berated him in front of other employees. ECF No. 29 at 2.
11 Mr. Reinholt further alleges that in December 2011 he threatened to report Mr.
12 Pape to the human resources department because of his constant bullying. ECF
13 No. 29 at 2. Mr. Reinholt states that this threat of reporting angered Mr. Pape.
14 ECF No. 29 at 2.

15 Mr. Reinholt also defrosted trucks as a Schwan's employee. *See* ECF No.
16 23-1 at 3-4. Mr. Reinholt explains that defrosting involves power washing a truck
17 and allowing ice and water to drain out. ECF No. 29 at 3. On January 17, 2012,
18 however, Mr. Pape brought a propane heater and ordered Mr. Reinholt to run the
19 heater inside a truck and shut the doors so that the ice would melt. ECF No. 29 at
20 3. Mr. Reinholt refused at first and told Mr. Pape that it was dangerous and
21

1 improper to use a propane heater to defrost the trucks, but Mr. Reinholt relented
2 because he thought that he would be fired if he did not comply with Mr. Pape's
3 order. ECF No. 29 at 3.

4 Mr. Pape placed the propane heater in one truck and showed Mr. Reinholt
5 how to set it up. ECF No. 28-1 at 8. Mr. Pape was present for at least part of the
6 time when the first truck was being defrosted. ECF No. 28-1 at 8-9.

7 When Mr. Reinholt used the propane heater to defrost another truck,
8 however, Mr. Pape was no longer at the facility. *See* ECF Nos. 23-2 at 4; 28-1 at
9 9. Mr. Reinholt placed the propane heater in the truck, as instructed, and shut the
10 doors. ECF No. 29 at 3. When he later opened the truck to remove the heater, the
11 gas ignited, throwing Mr. Reinholt backward and severely burning his face, ears,
12 and hands. ECF No. 29 at 3-4.

13 Mr. Reinholt sued Schwan's, asserting claims of intentional exposure to
14 danger, intentional infliction of emotional distress, and physical assault/battery and
15 deliberate intention to cause injury. ECF No. 9 at 5-7. He seeks relief including
16 lost wages, medical expenses, and attorney fees. ECF No. 9 at 8.

17 Schwan's moves for summary judgment, alleging that there is no evidence
18 supporting Mr. Reinholt's theory that Schwan's deliberately intended for Mr.
19 Reinholt to be harmed, and that his claims are barred against his employer absent
20 such a finding of intent. ECF No. 21 at 2. The parties also dispute whether Mr.
21 Reinholt may proceed with a separate claim that Mr. Pape's verbal abuse

1 constitutes intentional infliction of emotional distress. ECF Nos. 27 at 20; 32 at 9-
2 11.

3 ANALYSIS

4 **A. Summary judgment standard**

5 Summary judgment is appropriate when there is no genuine dispute as to any
6 material fact and the moving party is entitled to judgment as a matter of law. Fed.
7 R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the
8 absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S.
9 317, 323 (1986). The party asserting the existence of an issue of material fact must
10 show “sufficient evidence supporting the claimed factual dispute . . . to require a
11 jury or judge to resolve the parties’ differing versions of the truth at trial.” *T.W.*
12 *Elec. Serv. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)
13 (quoting *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). The
14 nonmoving party “may not rely on denials in the pleadings, but must produce
15 specific evidence, through affidavits or admissible discovery material, to show that
16 the dispute exists.” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.
17 1991).

18 In deciding a motion for summary judgment, a court must construe the
19 evidence and draw all reasonable inferences in the light most favorable to the
20 nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31.

1 **B. Deliberate intention to harm**

2 Washington's Industrial Insurance Act ("IIA") is the result of a "great
3 compromise between employers and employed." *Stertz v. Indus. Ins. Comm'n of*
4 *Wash.*, 91 Wash. 588, 590 (1916) *abrogated by Birklid v. Boeing Co.*, 127 Wn.2d
5 853 (1995). "Injured workers were given a swift, no-fault compensation system
6 for injuries on the job. Employers were given immunity from civil suits by
7 workers." *Birklid*, 127 Wn.2d at 859.

8 Employers that deliberately injure their employees, however, are not
9 immune from suit. If an employee's injury results "from the deliberate intention of
10 his or her employer to produce such injury," the employee has a cause of action as
11 if the IIA never had been enacted. RCW 51.24.020.

12 The Washington Supreme Court narrowly interprets this exception to
13 employer immunity. *Birklid*, 127 Wn.2d at 860. Until 1995, Washington courts
14 had found deliberate intent under RCW 51.24.020 in only one case where the issue
15 was disputed: when a supervisor struck an employee in the face with a pitcher
16 during an altercation. *Id.* at 861 (discussing *Perry v. Beverage*, 121 Wash. 652
17 (1922)). *Birklid* marks the first time that Washington courts interpreted "deliberate
18 intention" to reach beyond intentional physical assaults. *See id.*; *Vallandigham v.*
19 *Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 27 (2005).

20 In *Birklid*, after discussing more expansive interpretations of the term
21 "deliberate intention," the court held that it "means the employer had actual

1 knowledge that an injury was certain to occur and willfully disregarded that
2 knowledge.” 127 Wn.2d at 865.

3 The facts in *Birkliid* met this limited standard. In the case, a Boeing
4 supervisor wrote to management that workers were becoming sick from the fumes
5 of a chemical resin that was being tested for later use in airplane production. *Id.* at
6 856. The supervisor predicted that the problem would become worse as
7 temperatures rose and production increased. *Id.* Apparently due to economic
8 concerns, management denied the supervisor’s request for improved ventilation.
9 *See id.* When full production began, workers became ill, and the supervisor said
10 that he knew that the symptoms were reactions to working with the chemical resin.
11 *Id.*

12 Unlike prior cases, “[t]he central distinguishing fact” in *Birkliid* was that the
13 employer “knew in advance its workers would become ill from the [fumes], yet put
14 the new resin into production.” *Id.* at 863. The employer’s alleged acts went
15 “beyond gross negligence of the employer, and involve[d] willful disregard of
16 actual knowledge by the employer of continuing injuries to employees.” *Id.* The
17 court held that the workers’ evidence of deliberate intention was sufficient to
18 overcome the employer’s motion for summary judgment. *Id.* at 865-66.

19 In a recent case, the Washington Supreme Court reaffirmed *Birkliid*’s
20 “narrow test” for deliberate intention. *Walston v. Boeing Co.*, 334 P.3d 519, 521
21 (Wash. 2014). In *Walston*, the plaintiff was diagnosed with mesothelioma years

1 after being exposed to asbestos in 1985 while working at Boeing. *Id.* at 520.
2 Boeing did not dispute that it was aware in 1985 that asbestos was a hazardous
3 material, but one of the plaintiff's experts conceded that asbestos exposure was not
4 certain to cause disease. *Id.* at 521. The court found that proof of the potential to
5 develop a disease due to asbestos exposure was not sufficient to raise an issue of
6 material fact as to whether Boeing had actual knowledge that injury was certain.
7 *See id.* at 522 (“[Asbestos exposure] does cause a *risk* of disease, but as we have
8 previously held, that is insufficient to meet the *Birkliid* standard.”). The court
9 remanded the case to the trial court for entry of an order granting summary
10 judgment to the employer. *Id.* at 523.

11 Here, Schwan's claims that Mr. Reinholt cannot establish that Mr. Pape
12 deliberately intended to injure him. *See* ECF No. 21 at 11. Mr. Reinholt responds
13 that Mr. Pape was “aware that using a propane heater in the manner he instructed
14 was dangerous and would inevitably cause the propane to ignite and explode, [and]
15 he fully intended to injure plaintiff and ordered him to use the heater for the
16 purpose of causing plaintiff injury.” ECF No. 27 at 5. Mr. Reinholt notes that Mr.
17 Pape singled him out for the task of using the propane heater to defrost the trucks,
18 even though other workers were present. *See* ECF No. 28-1 at 7.

19 Mr. Reinholt contends that there is a genuine dispute regarding whether Mr.
20 Pape exercised “deliberate intention” under the more limited interpretation of the
21 term that existed prior to *Birkliid*. *See* ECF No. 27 at 2, 15 (citing *Perry*, 121

1 Wash. 652). In *Perry*, which was identified above as the only case prior to 1995
2 when a Washington court held that the exception for intentional injuries had been
3 met, a supervisor struck a worker in the face with an enameled water pitcher while
4 the two men were arguing. 121 Wash. at 655. The worker was injured seriously,
5 and the evidence considered by the jury included the supervisor's admission that
6 he had "struck him with all [his] might." *Id.* at 655, 659. The court held that
7 "[t]he jury had a right to find that the blow was struck with a deliberate intention to
8 do injury." *Id.* at 659.

9 Mr. Reinholt's theory of intentional injury is much more circuitous than the
10 events in *Perry*. Rather than suffering injury in the direct course of an attack that
11 would leave no uncertainty about the potential for physical harm, Mr. Reinholt
12 relies primarily on the animosity between him and Mr. Pape to show that Mr. Pape
13 intentionally injured him by ordering him to engage in a task that Mr. Reinholt
14 characterizes as certain to cause injury. *See* ECF No. 27 at 11-15. This issue is
15 more appropriately considered under the *Birklid* standard.

16 However, Mr. Reinholt has not met *Birklid*'s explanation of "deliberate
17 intention," either. Mr. Reinholt has not raised a genuine issue of fact regarding
18 whether his employer had actual knowledge that an injury was certain to occur.

19 Mr. Reinholt has not raised a legitimate dispute about whether the injury was
20 certain. Mr. Reinholt asserts that Mr. Pape was "aware that using a propane heater
21 in the manner he instructed was dangerous and would inevitably cause the propane

1 to ignite and explode,” ECF No. 27 at 5, but the evidence does not support his
2 contention. In fact, Mr. Pape used a propane heater to defrost a truck before Mr.
3 Reinholt was injured, apparently without causing any injury.¹ See ECF No. 28-1 at
4

5
6 ¹ There is conflicting evidence regarding how often Schwan’s employees at the
7 Spokane warehouse used propane heaters to defrost trucks prior to the date of the
8 incident. In an interview conducted on January 27, 2012, ten days after the
9 incident, in response to a question about whether the workers “normally use the
10 propane heaters to defrost the truck,” Mr. Reinholt stated “only between November
11 and til it warms up.” ECF No. 25-1 at 5.

12 In a declaration filed in opposition to the motion for summary judgment, however,
13 Mr. Reinholt explains that he was in a great deal of pain at the time of the
14 interview and was under the influence of medication. ECF No. 29 at 4. Mr.
15 Reinholt states that he does not recall the questions or his statements during the
16 interview and that he believes that his medications affected his ability to provide
17 information. ECF No. 29 at 4. Furthermore, another Spokane employee confirms
18 that, except for this incident, he had never seen someone using a propane heater to
19 defrost a truck. ECF No. 30 at 3.

20 For the purposes of summary judgment, the Court construes the evidence in the
21 light most favorable to Mr. Reinholt and assumes that workers in Schwan’s

1 8-9. Moreover, Mr. Pape did not place the heater in truck from which the
2 explosion occurred and was not present when the propane ignited, such that it
3 would be even more difficult for him to control the “certainty” of Mr. Reinholt’s
4 injury.

5 Furthermore, Mr. Reinholt has offered no evidence of prior injuries that
6 resulted from Schwan’s use of propane heaters to defrost trucks, which might tend
7 to show that Schwan’s had actual knowledge that he would be injured. Indeed,
8 Schwan’s safety manager is unaware of any portable heater accidents that occurred
9 during truck defrosting at any other Schwan’s facilities. ECF No. 24 at 4; *see also*
10 ECF No. 26 at 4 (Mr. Pape’s statement that, “to [his] knowledge, there is no
11 history of employees becoming injured as a result of explosions in Schwan’s
12 workplace” before this accident). Although Mr. Reinholt argues that Schwan’s
13 “own rules specifically forbade using a propane heater in the manner Pape
14 instructed,” ECF No. 27 at 5, the referenced section of Schwan’s employee
15 handbook includes only general admonitions to operate “equipment in a safe
16 manner at all times,” without providing any specific instruction regarding
17 defrosting trucks or using propane, *see* ECF No. 28-3. Moreover, even if
18 Schwan’s had knowledge that injury was possible, or even substantially certain, it
19 would be insufficient to create employer liability. *See Vallandigham*, 154 Wn.2d
20 Spokane warehouse did not use propane heaters to defrost trucks prior to the date
21 of the incident.

1 at 18 (“We reiterate that in order for an employer to act with deliberate intent,
2 injury must be *certain*; substantial certainty is not enough.”).

3 Mr. Reinholt’s case is unlike *Birklid*, where the employer knew in advance
4 that employees would become sick from exposure to a chemical because it had
5 happened before. Here, instead of establishing a genuine issue of whether Mr.
6 Pape actually knew that injury was certain to occur, the evidence shows that Mr.
7 Pape himself used a propane heater to defrost a truck, without being injured, and
8 that no one before Mr. Reinholt had been injured while defrosting a Schwan’s
9 truck with a propane heater. Although the practice carried some obvious risk, Mr.
10 Reinholt has not established a genuine dispute of material fact regarding whether
11 Schwan’s had actual knowledge that injury was certain.

12 **C. Intentional infliction of emotional distress**

13 The parties also dispute whether Mr. Reinholt’s claim of intentional
14 infliction of emotional distress (“outrage”) may proceed. ECF Nos. 21 at 19-21;
15 27 at 19-21. A claim of outrage may survive the IIA’s grant of employer immunity
16 from suit if a plaintiff satisfies the separate-injury test. *See Birklid*, 127 Wn.2d at
17 871-72. To meet this test, injury from outrage and a workplace physical injury
18 must (1) be of a different nature, (2) arise at different times in the employee’s work
19 history, and (3) require different causal factors. *See id.* at 869, 71-72.

20 To the extent that Mr. Reinholt’s claim of outrage rests on injuries that he
21 suffered due to the propane gas explosion, the claim does not pass the separate-

1 injury test. The outrage injury arose from the exact same cause and at the same
2 time as the injuries that prompted Mr. Reinholt's other tort claims.

3 Mr. Reinholt claims in his response to Schwan's motion for summary
4 judgment that he also suffered a separate injury "as a result of Pape's constant
5 bullying, and verbal and physically threatening behavior." ECF No. 27 at 20.
6 Although Mr. Reinholt discussed Mr. Pape's verbal abuse in prior filings, *see, e.g.*,
7 ECF No. 9 at 3, his response to the motion for summary judgment is the first time
8 that Mr. Reinholt expressly claims that the verbal abuse and Mr. Pape's threatening
9 behavior is an independent cause of injury that has "psychologically scarred [him]
10 for life," *see* ECF No. 29 at 6. In contrast, in response to Schwan's discovery
11 request for "the factual basis for each and every one" of his claims, Mr. Reinholt
12 referred to his contentious relationship with Mr. Pape only as evidence that Mr.
13 Pape intended for him to be injured when he ordered him to defrost the truck. ECF
14 No. 23-3 at 12-13.

15 To bring a successful claim of outrage, a plaintiff must show "(1) extreme
16 and outrageous conduct, (2) intentional or reckless infliction of emotional distress,
17 and (3) severe emotional distress on the part of the plaintiff." *Reid v. Pierce Cnty.*,
18 136 Wn.2d 195, 202 (1998) (citing *Dicomes v. State*, 113 Wn.2d 612, 630 (1989)).
19 The threshold to establish the first factor is very high, "mean[ing] that the conduct
20 supporting the claim must be appallingly low." *Robel v. Roundup Corp.*, 148 Wn.
21 2d 35, 51 (2002). The conduct must be must be "*so outrageous in character, and*

1 *so extreme in degree, as to go beyond all possible bounds of decency, and to be*
2 *regarded as atrocious, and utterly intolerable in a civilized community.” Grimsby*
3 *v. Samson*, 85 Wn.2d 52, 59 (1975). Whether the conduct is sufficiently
4 outrageous normally is a jury question, “but it is initially for the court to determine
5 if reasonable minds could differ on whether the conduct was sufficiently extreme
6 to result in liability.” *Dicomes*, 113 Wn. 2d at 630.

7 Here, Mr. Reinholt explains that Mr. Pape “consistently verbally abused and
8 threatened [him],” made unreasonable work demands, and berated him in front of
9 other employees. ECF No. 29 at 2. Although there were no physical altercations
10 between the two men, Mr. Reinholt reports that he believed that Mr. Pape intended
11 to inflict physical harm on him. ECF No. 28-1 at 3, 4. Mr. Pape also walked
12 toward Mr. Reinholt fast, which Mr. Reinholt interpreted to be a threat. ECF No.
13 28-1 at 3. At the hearing, Mr. Reinholt’s counsel also offered that Mr. Pape’s act
14 of requiring Mr. Reinholt to use the propane heater to defrost the truck, over his
15 protests, supports the claim of outrage.

16 Viewing the evidence in the light most favorable to Mr. Reinholt, the
17 evidence provided is insufficient to withstand summary judgment. The Court finds
18 that reasonable minds could not differ on whether Mr. Pape’s conduct was so
19 extreme and outrageous as to support a viable claim of outrage. Although Mr.
20 Pape’s behavior, as described by Mr. Reinholt, was demeaning and at times even
21 threatening, the tort of outrage does not encompass such actions. *See Grimsby*, 85

1 Wn.2d at 59 (liability does not exist for “insults, indignities, threats, annoyances,
2 petty oppressions, or other trivialities”) (quoting RESTATEMENT (SECOND) OF
3 TORTS § 46 cmt. D).

4 CONCLUSION

5 The Court holds that Mr. Reinholt has not provided sufficient evidence to
6 demonstrate that a genuine dispute exists as to the “deliberate intention” exception
7 to the IIA. Mr. Reinholt also failed to establish a genuine dispute of material fact
8 as to whether Mr. Pape’s abuse at the workplace rose to the level of extreme
9 conduct that might support a separate claim of outrage.

10 Accordingly, **IT IS HEREBY ORDERED** that Defendant’s Motion for
11 Summary Judgment, **ECF No. 21**, is **GRANTED**.

12 The District Court Clerk is directed to enter this Order, provide copies to
13 counsel, enter Judgment accordingly, and **close** this case.

14 **DATED** this 7th of November 2014.

15
16 s/ Rosanna Malouf Peterson
17 ROSANNA MALOUF PETERSON
18 Chief United States District Court Judge
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